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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PRINCETON UNIVERSITY AND
STATE OF NEW JERSEY, *Appellants,*

v.

CHRIS SCHMID, *Appellee.*

On Appeal From The Supreme Court Of New Jersey

BRIEF OF THE AMERICAN COUNCIL ON EDUCATION AND THE NATIONAL INSTITUTE OF INDEPENDENT COLLEGES AND UNIVERSITIES AMICI CURIAE IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

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INTEREST OF AMICI

The American Council on Education (ACE) and the National Institute of Independent Colleges and Universities (NIICU) are nonprofit corporations organized under the laws of, and located in, the District of Columbia. Founded in 1918, ACE is a voluntary membership organization composed of 1,401 nonprofit institutions of higher education from both the public and private sectors and 178 educational associations and organizations. NIICU's membership consists of approximately 800 independent, non-profit colleges, universities and educational associations.

ACE is the nation's major coordinating body in postsecondary education. NIICU's mission is to provide a unified national voice for independent higher education in the shaping of public policy. As organizations whose members include the over-whelming majority of four-year colleges and universities, ACE and NIICU are uniquely able to represent the interests of higher education generally on matters of national importance, including the case pending before this Court.

All of the colleges and universities that are members of ACE and NIICU have a substantial interest in the outcome of this case. Nineteen of ACE's and/or NIICU's members are independent, non-profit colleges and universities located in New Jersey. In addition to Princeton University, included in ACE's and/or NIICU's membership are: Beth Medrash Gohova, Bloomfield College, Caldwell College, Centenary College, College of Saint Elizabeth, Drew University, Fairleigh Dickinson University, Felician College, Georgian Court College, Monmouth College, New Brunswick Theological Seminary, Northeastern Bible College, Rider College, Saint Peter's College, Seton Hall University, Stevens Institute of Technology, Union College, Upsala College and Westminster Choir College. All of these institutions will be affected directly by the Court's answer to the question presented for review:

> Whether a private university has the right under the First, Fifth and Fourteenth Amendments to determine without state interference what expressive activities by strangers it will permit on its campus and under what circumstances.

The decision of the New Jersey Supreme Court subjects each of these colleges to governmental scrutiny and regulation of expressive activities that are protected from infringment by the United States Constitution.

The many other independent colleges and universities not located in New Jersey that are members of ACE and NIICU also have a substantial stake in the outcome of the Court's review of this case. The Court's judgment regarding the proper balance to be struck between the first amendment right of colleges and universities to determine and pursue educational objectives and the police power of the states can have nationwide consequences.

Finally, the public colleges and universities that are members of ACE have a significant interest in the answer to the question presented by appellants. For purposes of interpreting the scope of an individual's first amendment rights, the courts have long recognized valid and important distinctions between the grounds and buildings of government operated colleges and universities and public streets and parks. A decision that fails to recognize the expressive nature of the education enterprise and to take that into account in balancing Constitutionally protected interests could lead to erosion of other Supreme Court doctrines that properly limit governmental intrusion on academic freedom and insure the ability of all colleges and universities to regulate the use of their facilities in a manner consistent with maintaining an environment conducive to teaching and learning.

SUMMARY OF THE ARGUMENT

In *Princeton University and State of New Jersey* v. *Schmid,* the New Jersey Supreme Court interpreted the New Jersey Constitution as conferring on strangers to the campus of a private university an affirmative right to engage in expressive activities on the college's private property. This interpretation of New Jersey law presents

a substantial federal constitutional question deserving plenary review by this Court.

The decision of the New Jersey Court has the effect of compelling Princeton University to grant access to all parties to the private forum it maintains. This requirement infringes on the four freedoms essential to any university and guaranteed by the first amendment: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."

The University's federally protected first amendment right to academic freedom is paramount to any expressional rights conferred on Mr. Schmid by the State of New Jersey. The decision of the New Jersey Supreme Court is, therefore, not supported by this Court's decision in *PruneYard Shopping Center* v. *Robins,* it contravenes the federal constitution and public policy, and it must be reviewed and reversed.

ARGUMENT

I.

The Federal Question Timely Presented For Review Is So Substantial It Requires Plenary Consideration For Its Resolution.

Appellants Princeton University (Princeton) and the State of New Jersey have asked this Court to decide

> [w]hether a private university has the right under the First, Fifth and Fourteenth Amendments to determine without state interference what expressive activities by strangers it will permit on its campus and under what circumstances.

This question presents a substantial issue of federal constitutional law that was properly raised in the courts below and timely brought to this Court for resolution.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2). Section 1257(2) authorizes review of the decision of the New Jersey Supreme Court in *Princeton University and State of New Jersey* v. *Schmid* (hereinafter *Schmid*) because in deciding *Schmid* the New Jersey court of last resort held a state statute[1] valid in the face of a properly presented claim that such statute is repugnant to the Federal Constitution. In *Schmid,* the New Jersey Supreme Court read the "free speech" clauses of the State's Constitution — article I, paragraphs 6 and 18 — as conferring on strangers to the campus of a private university an affirmative right to engage in expressive activities on the college's private property.

This application of the New Jersey Constitution infringes Princeton's federally guaranteed first amendment rights as an independent college or university to determine and fulfill its educational mission.[2] Princeton unsuccessfully challenged this reading of the New Jersey Constitution in a petition for rehearing timely filed. Ap-

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[1] The challenged "statute" in this case is actually two provisions of the New Jersey Constitution: article I, paragraph 6 and article I, paragraph 18. For purposes of appeal, the Supreme Court has long held that the term "statute" encompasses state constitutions. *E.g., Railway Express Agency* v. *Virginia,* 282 U.S. 440 (1931).

[2] There may be some circumstances, *e.g.* those involving a shopping center or similar commercial enterprise open to the general public, in which it can be argued no substantial federal issue is raised by a reading of the state free speech provisions to limit the rights of private property owners to exclude people from their premises. In order to be entitled to appeal under §1257(2) appellants are not required to challenge the constitutional provisions in their entirety. "A statute may be invalid as applied to one set of facts yet valid as applied to another." *Dahnke-Walker Co.* v. *Bonurant,* 257 U.S. 282 (1921).

pellants' Jurisdictional Statement at 6. As in *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 64 L. Ed.2d 741, 100 S.Ct. 2035 (1980), appeal is the proper method of review in this case.

The New Jersey Supreme Court's refusal to decide the important constitutional question posed by Princeton raises questions of law and policy that are of substantial interest to the entire higher education community and the nation and deserve this Court's full attention and thoughtful consideration. To paraphrase this Court's decision in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 247n.6 (1974), any ultimate decision by this Court of the issue presented for review in this case, which leaves unanswered such an important first amendment question of academic freedom and institutional autonomy would be intolerable.

II.

The Federal Constitution Protects Princeton University And Other Independent, Non-Profit Colleges And Universities From Being Compelled By The States To Provide Forums For The Expressive Activities Of Strangers To Their Campuses.

***The Court Below Failed To Recongize The Important First Amendment Interests Of Colleges And Universities Which Require Greater Restriction Of The State's Power To Compel Owners Of Private Property To Permit Expressive Activity Than Was Necessary Or Appropriate Under The Facts Of This Court's Decision In* PruneYard.**

In *Hudgens* v. *N.L.R.B.*, 424 U.S. 507 (1976), the Supreme Court laid to rest the notion that the federal contitutional guarantee of free speech has a part to play in ordering the relationship of two private parties:

> It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only

> against abridgement by government, federal or state. 424 U.S. at 513.

At the same time, the Court held open the possibility that "statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others. . . ." *Id.*

In *PruneYard Shopping Center* v. *Robins, supra,* the Court confronted its first example after *Hudgens* of state law designed or interpreted to provide additional protection to expressive activities. The Court upheld a decision of the California Supreme Court, *Robins* v. *PruneYard Shopping Center,* 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), that the California Constitution protects the reasonable exercise of free speech in private shopping centers. However, in affirming the lower court decision, the Supreme Court made clear that the exercise of the state police power to protect free speech activities on private property is not without limits, and it is the limits identified in *PruneYard* that require reversal of the New Jersey Supreme Court's decision in this case.

In *PruneYard* the Supreme Court held:

> It is, of course, well-established that a State in the exercise of its police power may adopt reasonable restrictions on private property *so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision.* (emphasis added). 447 U.S. at 81.

The Court rejected the arguments of the shopping center owners in *PruneYard* that the California court's interpretation of the state constitution resulted in a prohibited taking or infringed any other federally guar-

anteed constitutional right of the owners. Specifically, the Supreme Court concluded there was no infringement of the shopping center owner's first amendment rights. 447 U.S. at 88.

The *PruneYard* case is easily indistinguished from *Princeton University* v. *Schmid*, the case now before the Court. Unlike shopping centers which are business establishments with no expressive mission, universities and colleges have as their primary purpose the expressive activities of teaching and research.[1] These purposes are analogous to the functions of newpaper editors that the Court held worthy of protection from even benign state intrusion in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), and their entitlement to first amendment protection distinguishes *Schmid* from *PruneYard*.

In *University of California Regents* v. *Bakke*, 438 U.S. 265 (1978), the Supreme Court recognized that the freedom of universities to conduct their "business" is "a special concern of the First Amendment." 438 U.S. at 312. Quoting from Justice Frankfurter's concurring opinion in *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957), the Court in *Bakke* affirmed that there are four "freedoms" essential to a university: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." 438 U.S. at 312. Encompassed within these four freedoms is the right to control free from government intrusion access to the forum which a university and its campus represents.

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[1] The function of a university is "to impart learning and to advance the boundaries of knowledge." *Goldberg* v. *The Regents of the University of California*, 248 Cal. App.2d 867, 57 Ca. Rptr. 463 (1967).

In *Miami* v. *Tornillo, supra, citing CBS, Inc.* v. *Democratic Nat'l C'ee*, 412 U.S. 94, 117 (1973), the Court recognized only two controls on the power of the privately owned press to determine and advance its political, social and economic views — the sufficiency of its readers, and the journalistic interests of its editors. Recognizing that neither of these controls might be sufficient to guarantee that the private press would be "responsible" in its selection of news items and fair in its presentation of varying points of view, the Court nonetheless invalidated a Florida statute that sought to guarantee a range of parties access to the media for the purpose of insuring free and fair elections by ensuring an informed electorate.

> A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated. 418 U.S. at 256.

Similarly, the number of students wishing to attend an institution and the number of other parties wishing to contribute to its financial well being together with the educational interests of its faculty, students and administration are the only controls that should operate to circumscribe the four essential freedoms of a private university.

Justice Frankfurter, concurring in *Sweezy* v. *New Hampshire*, 354 U.S. 234, 261-62 (1957), described best the attitude the courts should have in approaching questions about governmental intrusion in the intellectual life of universities:

> Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true

> in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good-if understanding be an essential need of society-inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. *Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obivously compelling.* (Emphasis added.)

To determine in this case whether there exist compelling interests sufficient to justify the state's intrusion on Princeton's academic freedom, it is necessary first to understand what is *not* at issue here. This case does not present a conflict among members of "the community of scholars" or a situation in which either teachers or students are circumscribed by the administration in their exercise of academic freedom. This case presents the question *who* should decide what rule the "community of scholars" should observe regarding access by persons who are not members of the University community to the scholars' "marketplace of ideas."

In this case the record shows that the solicitation rule challenged by Mr. Schmid and held unconstitutional under the New Jersey Constitution was adopted not by the University administration acting unilaterally but by the Council of the Princeton University Community — a body composed of students, faculty, staff, alumni and administrators. Appellants' Jurisdictional Statement at

2a. The record further shows that the challenged rule governing access was amended by the same representative body in 1979 after Mr. Schmid's trepass arrest and conviction. Appellants Jurisdictional Statement at 2a. Thus, it is the entire University community's policy decision that is adversely affected here not just the whim of an administrator or the contested edict of a governing board.

The New Jersey Supreme Court cited the special nature and needs of the education enterprise in its decision below:

> Private educational institutions perform an essential social function and have a fundamental responsibility to assure the academic and general well-being of their communities of students, teachers and related personnel. At a minimum, these needs, implicating academic freedom and development, justify an educational institution in controlling those who seek to enter its domain. The singular need to achieve essential educational goals and regulate activities that impact upon these efforts has been acknowledged even with respect to public educational institutions. *See, e.g., Healy* v. *James, supra,* 408 U.S. at 180, 92 S. Ct. at 2345, 33 L. Ed. 2d at 279; *Tinker* v. *Des Moines Indep. Community School Dist.*, 393 U.S. 503, 513-514, 89 S. Ct. 733, 740-741, 21 L. Ed. 2d 731, 741-742 (1969). Appellants' Jurisdictional Statement at 31a.

Yet, the court failed to recognize that the educational policy judgment made by the Council of the Princeton University Community is accorded protection from state intrusion by the first amendment, and it did not develop "obviously compelling" reasons for the intrusion on the first amendment interests of the "community of scholars" countenanced and compelled by the court's decision.

The New Jersey Supreme Court referred to the need to "achieve the optimal balance between the protections to be accorded private property and those to be given to expressional freedoms exercised upon such property." Appellants Jurisdictional Statement at 26a. The court held that in this balance the property interests of Princeton must give way to the free speech interests of Mr. Schmid except in so far as Princeton may set reasonable rules to control the exercise of expressional rights on its property. The expressional rights of Princeton were missing in the court's equation and, consequently, the balance reached in the court's decision is improperly weighed in Mr. Schmid's favor.

III

Convincing Educational Policy Considerations Argue Against Judicial Supervision Of University Decision-Making In This Case.

As one reads the New Jersey Supreme Court's opinion in this case, one cannot help but note the court's obvious underlying conviction that in *its* view the solicitation rule enforced by Princeton was in conflict with the court's notion of the proper way to administer a "market place of ideas." It may be that Princeton's rule was illogical or unwise but that is not the province of the court to decide absent compelling constitutional reasons.

The comments of Chief Justice Holmes for the majority in *Otis* v. *Parker,* 187 U.S. 606, 608-9 (1903), are apposite here:

> While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for

> differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus.*

Judicial supervision and direction of private university decision-making regarding expressive activities on campus can only "undermine the integrity of private educational institutions, and, with it, the ability of these schools both to experiment and innovate in educational matters, and to satisfy a wide variety of individual wants." Note, *Developments in the Law-Academic Freedom,* 81 HARV. L. REV. 1045, 1055 (1968). "[T]he interests of autonomy in private education call for judicial abstention [in this case]." *Id.*

The process by which Princeton's solicitation rule evolved and was amended is precisely the sort of educational experience one would hope this country's universities are providing their students. As Chief Justice Burger said in his concurring opinion in *Healy* v. *James,* 408 U.S. 169 (1972) (Burger, C.J. concurring),

> [P]art of the educational experience of every college student should be an experience in responsible self-government and this must be a joint enterprise of students and faculty. *It should not be imposed unilaterally from above* . . . (emphasis added).

The courts should be the "last resort" in matters this central to the educational process. *Id.* When as in this case the policy judgment being reviewed represents a concensus reached through a lively and wide ranging internal debate, the courts should not choose lightly to substitute judicial edict for this exemplary educational experience.

This is particularly true given the importance to society of diversity in the higher education experiences offered to students and the pressures toward conformity among colleges and universities that already exist. Diversity among colleges and universities does more than enlarge the range of educational products from which student consumers may choose. Evidence indicates that differences in the educational environments presented by different kinds of institutions (*e.g.*, highly selective and comprehensive universities, strongly denominational liberal arts colleges and colleges emphasizing engineering and science) result in differences in the progress and performance of their students and alumni. *See* C.R. PACE, THE DEMISE OF DIVERSITY? A COMPARATIVE PROFILE OF EIGHT TYPES OF INSTITUTIONS 1974 (hereinafter PACE). Enrollment changes since 1950 have tended to favor the large state universities and, consequently, the contribution and national impact of the distinctiveness of general liberal arts colleges has been reduced. PACE at 130.

These trends have led the authors of a technical report sponsored by the Carnegie Commission on Higher Education to observe

> we think it should be of some concern to those who shape public policy to note that the most distinctive institutions [for the most part private selective institutions], which means to some extent the institutions that are most effective in achieving their purposes, are also the ones that enroll the fewest students, are in the most serious financial condition today, and whose long range future is least assured . . . Further drift toward a least common denominator — whether in public tax policies, *educational conformity*, or private philanthropy — may further reduce the pockets of excellence and distinction in higher education that still remain. (emphasis added) PACE at 131.

A rule which erodes the distinctions between public and private institutions of higher education such as that adopted by the New Jersey Supreme Court in *Schmid* is exactly the sort of push toward educational conformity the Carnegie Commission report decries.

CONCLUSION

For each of the reasons set forth above, this Court should note probable jurisdiction to review the opinion and judgment of the court below.

Respectfully submitted,

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